

SUPREMACY OF EUROPEAN LAW AND POSSIBLE JUDICIAL REMEDIES IN REGARD TO THE ISSUE OF ROMANIA’S ACCESSION TO THE SCHENGEN AREA

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ABSTRACT: *The paper is intended to serve as a study of the present and most recent issues regarding the viability, applicability and consequences of enforceability of the principle of Supremacy of European Law. While the doctrine is not novel, certain measures taken by European and National authorities have shaped and altered this doctrine and have generated interesting legal issues. In this respect, the paper will focus on: (i) firstly, identifying and describing the basis, general concept and effects of embracing this doctrine; and (ii) secondly, bringing forward specific national and international issues of this doctrine in respect of Romania’s accession to the Schengen Area. In relation to this subject, with the aim of enhancing the overall knowledge of this topic, the authors analysed the issue in light of the judicial remedies available to Romania in the context of the manifested opposition of some European states that lead to the failure of the accession process of Romania to the Schengen Area.*

KEYWORDS: *Supremacy of European Law; Schengen Area; accession; responsibility; European Court of Justice.*

JEL CODE: *K 33*

1. INTRODUCTORY REMARKS IN REGARD TO THE EU LAW SUPREMACY PRINCIPLE

“The potential conflicts and collisions of systems that can in principle occur as between Community and Member States do not occur in a legal vacuum, but in a space to which international law is also relevant¹”

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¹N. MacCormick, *Questioning Sovereignty*, Oxford University Press, Oxford, 1999, p. 120;

It should be generally acknowledged even from the onset that the matter, subject to review in this paper, represents an enduring question, absent of a clear answer but generator of ongoing legal issues. It was readily apparent, from the genesis of the idea of a European Union, that there will be clashes between European law and national law². As a matter of a customary rule³ of public international law, states benefit from the privilege of sovereignty⁴ - in national legislative, administrative and enforcement matters⁵ - understood in its plenipotentiary dimension, subdued arguably only by *jus cogens*⁶ rules which generate *erga omnes* obligations to all states. Armed with this universally agreed base stone principle of international law, states have entertained an ongoing dance with the grand concept of a European Union, seeking to make the best of both worlds. The enunciation of the principle of EU law supremacy by the ECJ⁷ in its landmark decision in the *Costa v. ENEL Case*⁸ has ignited the hysteria of national authorities, to the delight of law publicists. National authorities, jurisdictional organs and finally doctrine had the burdensome task of seeking the solution to an ever evolving organic problem. This paper aims to present the fundamental concepts of the theory of supremacy of European law over Member States national law, by means of a brief historical, case-law and comparative study, focusing finally on the analysis of the case of Romania and the current issues it faces in tackling the answer of European law supremacy.

The principle of supremacy has been the cornerstone of the European Union's legal system, ensuring the uniform application and effectiveness of European law⁹. Some authors would dare argue, using the jurisprudence of the European Court of Justice, that European law is supreme over national law of the Members States in all aspects, including the fundamental norms of their national constitutions¹⁰. In a nutshell, the principle of supremacy of European law provides that in case of conflicting national and European norms, the latter shall prevail, regardless of whether the conflicting national law has been passed prior or subsequent to the drafting of the European norm. Moreover, national courts are bound to give immediate and automatic precedence to European law and set aside conflicting national law provisions. What is peculiar about this concept is that it has never been specifically expressed in the treaty framework governing the working of the

²P. Graig, *The ECJ, National courts and The Supremacy of Community Law*, available online at: www.ecln.net/elements/conferences/bookrome/craig.pdf, viewed on the 19 November 2013 at 9:00pm, at p. 1;

³Article 38(1)(b), United Nations, *Statute of the international Court of Justice*, 18 April 1946, available online at: <http://refworld.org/docid/3deb4b9c0.html>, viewed on the 19 November 2013 at 9:15pm; *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark and The Netherlands)*, [1969] ICJ Rep 3, at p. 43;

⁴Article 2(1), United Nations, *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7;

⁵American Law Institute, *Restatement of the Law, Third, The foreign Relations Law of the United States* (American Law Inst., 1986);

⁶Article 59, United Nations, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331; E.J. Criddle & E. F. Decent, *A fiduciary theory of Jus Cogens*, *The Yale Journal of International Law*, vol. 34:331, Yale University Press, 2009;

⁷P. Graig, *The ECJ, National courts and The Supremacy of Community Law*, available online at: www.ecln.net/elements/conferences/bookrome/craig.pdf, viewed on the 26 November 2013 at 9:00pm, at p. 1;

⁸Case 6/64, [1964] ECR 585, 593;

⁹A. Albi, *Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of Co-operative Constitutionalism.*, *European Constitutional Law Review*, Vol. 3, 2007:pp 25-67;

¹⁰*Ibidem*, p. 1;

European Union¹¹. Some publicists argue that an implied reference to this principle is made in article 10(1) of the Treaty on the European Union¹². Even part of an international treaty, the provision, in its wording, provides for a due diligence obligation to obey the regime of the Treaty as a whole. Only by means of interpretation, one could make an argument that European law supremacy is embedded in this provision, which would be at least overly burdensome if we considered the general principles of interpretation.

The principle, as mentioned above, was legally conceived and nurtured by the European Court of Justice. The 1960s are regarded by some publicists as the *Big Bang* of European legal integration¹³. The ECJ's judgments in *Van Gend & Loos* (1963) and *Costa/ENEL* (1964) are universally thought to be the twin pristine heralds of a court treading higher ground, leaving behind conceptions of what international judges do and are capable of¹⁴. Legal integration steadily proceeded thereafter, as each of the High Courts in the EU gradually accepted supremacy and its consequences, merging the new doctrine with their own municipal legal framework¹⁵. However the constitutionalization process has been full of friction. This is because, on the one hand, the ECJ does not sit as a Supreme Court at the apex of a unified system, and on the other hand, we have the negotiated character of the relation between national Constitutional Courts and the ECJ which, in some cases, resulted in a non-uniform practice. Nevertheless, in order to grasp a better understanding of the doctrine of EU law supremacy, a brief presentation of ECJ case-law is mandatory.

Three principal arguments in the ECJ case law can be pointed out as they justify the primacy of European law: (i) the international legal obligation to observe treaties (*pacta sunt servanda* rule as expressed in the VCLT and embraced by the ECJ in the *Humblet* case¹⁶); (ii) ensuring the efficacy and uniform application of European law¹⁷; and (iii) the autonomous character of the European Union legal order¹⁸. It is interesting to mention at this point, that while for the first two arguments, the Court did use some kind of legal justification for the enounced principles, for the latter (that is the autonomous character of the EU), the ECJ simply treated this matter as an axiomatically principle¹⁹.

¹¹ One attempt was made in the Treaty establishing a Constitution for Europe, signed on 29 October 2004, but which due to the refusal of French and Dutch voters in May and June 2005 was never ratified.

¹² Art. 10(1) of the TEU reads as follows: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

¹³ A.S. Sweet, *The European Court of Justice and the judicialization of EU governance*, available online at: europeangovernance.livingreviews.org/open?pubNo=lreg-2010-2&page=articlese6.html, visited on 30.11.2013 at 13.54;

¹⁴ H. DE Waele, *The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment*, European Law/Europarecht (2010), available online at: www.hanselawreview.org/pdf9/Vol6No01Art01.pdf on 27.11.2013 at 9:48 am;

¹⁵ A. M. Slaughter et al., *The European Court and the National Courts – Doctrines and Jurisprudence: Legal Change in its Social Contest*, Hart Publishing, Oxford, 1998;

¹⁶ *Humblet v. Belgian State*, Case 6/60, 1960, ECR 559-569;

¹⁷ *Walt Wilhelm et al v. Bundeskartellamt*, Case 14/68, ECR, 1, (1969), para 6;

¹⁸ R. Kwiecien, *The Primacy of European Union Law over National Law under the Constitutional Treaty*, in Special Issue- Unity of the European Constitution, GLJ, vol. 6. No. 11, 2005, p. 1479;

¹⁹ J. Wouters, *National Constitutions and the European Union*, in Legal Issues of Economic Integration, Issue 1, (2000) pp. 25-92;

In *Van Gend & Loos* the Court established the principle of direct effect, which essentially means that the provisions of the European Economic Community Treaty, as it then was, are capable of creating rights for individuals, and these rights can be enforced by these individuals in the courts of Member States. The wording of the Court's ruling is very clear and exemplary in defining the doctrine of direct approach:

"The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage²⁰."

The decision in *Flaminio Costa v. ENEL* rendered by the ECJ made history. The Court basically decided that community law had supremacy over national law²¹. To this day the judgment is the bedrock of the importance of Community law in all Member States of the European Union²², making in the opinion of some publicists, the important step to the "supranational" regime of European law²³, as intended by the European treaties. The ECJ declared as follows:

"The precedence of Community law is confirmed by Article 189, whereby a regulation <shall be binding> and <directly applicable in all Member States>".

These two landmark decisions made way to an avalanche of legal debates on the relation between European and national law²⁴. Reactions to this decision were different in several Member States. Generally, states had no difficulty in accepting and complying with this decision, in respect to the primacy of EU law in contrast to non-constitutional domestic legislation²⁵.

However, the ECJ went yet a step forward in the *Internationale Handelsgesellschaft*²⁶ Case in which it held that European law should take precedence over all provisions in national law, whatever its legal status. This means

"[...] validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights

²⁰ NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26/62, 5th February 1963, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:NOT>, accessed on 27.11.2013 at 10.10 am;

²¹ *Flaminio Costa v ENEL*, Case 6/64, 15th July 1964. available online at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61964J0006, visited on 17.11.2013 at 15.30;

²² A.K. Mangold, *Costa v Enel (1964): On the Importance of Contemporary Legal History*, available online at: http://www.academia.edu/454331/Costa_v_ENEL_1964_On_the_Importance_of_Contemporary_Legal_History, visited on 27.11.2013 at 15.38;

²³ C. Sasse, *The Common Market: Between International and Municipal Law*, *The Yale Law Journal* 75 (1965/66), pp. 695-753;

²⁴ B. Marian, *The Dualist and Monist Theories. International Law's comprehension of these theories*, available online at: http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf, visited on 27.11.2013 at 22.15;

²⁵ B. de White, *The Nature of the Legal Order*, in P. Craig and G. De Burca, *The Evolution of EU Law*, Oxford University Press, Oxford, 1999, pg. 193-205;

²⁶ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, case 11/70, ECR 1125, (1970);

as formulated by the constitution of that State or the principles of a national constitutional structure.”

This ruling made it clear - European law has precedence even over national legislation that was adopted after the relevant Community provision and, fundamental rights that are part of a Constitution or the constitutional structure of a Member State cannot affect the validity of European law. Considering the nature of states in the international legal order, it is easy to understand that there has been much difficulty in accepting absolute supremacy over national constitutional provisions by Member States. This issue is the subject matter of the next section.

2. EU SUPREMACY, ROMANIA AND EMERGING ISSUES

One issue that I would like to put forward for discussion, in the perspective of the theoretical background presented so far, relates to one of the crucial targets that Romania has set for itself, in relation to the EU integration process: the accession to the Schengen Area. The question that I would like to frame, envisages the existence of a breach by the EU of our right to join the Schengen Area in light of the principles of international law and the principle of supremacy of EU law. In order to achieve this, a brief description of the evolution of the mechanism that led to the establishment of the Schengen Area is required.

As such, in the context of the ever evolving desire to give an appropriate and concrete response to the demands of the citizens of the Members States of the European Community, the European Council, at its reunion of Fontainebleau in June 1984, established that an appropriate solution for straightening and promoting the identity and image of the *European construction* (that later became the European Union), both for its citizens and the rest of the world, would be the “*elimination of the police and frontier formalities for all persons who cross the intra-community frontiers*”

The concrete application of this idea became possible with the conclusion of the intergovernmental Agreement between the Benelux Economic Union, the Federal Republic of Germany and the Republic of France, which established the gradual elimination of the inter-frontier checks, treaty signed on the 14th of June 1985, known as the Schengen Accord²⁷. In order to expand the mechanisms for the application of this agreement, on the 19th of June 1990, a further treaty²⁸ was concluded, treaty known as the Treaty for the Application of the Schengen Accord, between the Belgian Kingdom, the Federal Republic of Germany, France, Luxemburg and the Netherlands. Italy, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden, signed the necessary protocols and the agreement for the accession to the Schengen Accord and the Convention for the Implementation of the Schengen Accord.

²⁷ The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 14th June 1985, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2801%29:EN:NOT>;

²⁸ The Schengen acquis - *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, Official Journal L 239 , 22/09/2000 P. 0019 - 0062;

The Schengen Accord, the Convention for the implementation of the Schengen Accord and the Protocols that followed until 1996, represent the workings of the states with the aim of cooperation in specific areas under the regime imposed by public international law. From the provisions of article 140 of the Convention for the implementation of the Schengen Accord and the state practice that has developed in relation to the extension of the Schengen cooperation scheme, up until the birth of the European Union, we can clearly observe and safely incur that the mechanism for the accession of a third state to the Schengen Area was governed by public international law. In practice, in order for a state to join this cooperation scheme, each member state must undertake a procedure that involves the conclusion of a treaty between the requiring state and the states already members of the Schengen Area, together with the completion of the ratification process by all states. In light of the rules imposed by public international law, the consent given by a state by the means of signing and ratifying a treaty, represents an unconditional and freely agreed act of the State, that engages that State under the rules of international law²⁹. In other words, none of these states can be obliged to either sign or ratify these treaties.

The second important step in the political and legal development of the Schengen Area begins once the Amsterdam Treaty comes into force together³⁰ with the Protocol for the integration of the Schengen acquis within the European Union, Protocol annexed to the Treaty of the European Union and the Treaty for the creation of the European Community (Protocol that is also known and will be further referred to as the Schengen Protocol).³¹

The Schengen Protocol authorized the Member States of the European Community (at that time) which were at the same time parties to the Schengen Accord and the Convention for the implementation of the Schengen Accord to “*establish among them a strengthened cooperation scheme in the areas provided by the aforementioned agreements and the supplementary provisions.*”

Starting from that point forward, the cooperation within the domains established by the Schengen Accord and the Implementation Convention would be carried out in accordance with the judicial and institutional system regulated by the European Union and with respect to the applicable provisions of the European Union Treaty and the Treaty for the establishment of the European Community.

If we follow the evolution of the ideas envisaged by the agreements that stood at the foundation of the European construction, which are referred to today by the Treaty for the functioning of the European Union as the liberty, security and justice area, and to which this treaty reserves an entire chapter, we can conclude that these ideals have suffered the most once the Schengen Acquis was integrated in the European Union workings.

The 1997 Amsterdam treaty, by virtue of which the Schengen Acquis was integrated in the mechanisms regulated under the European Union, enhancing the progress made to that point within the Union and outside of its system (within the initial Schengen cooperation scheme), establishes explicitly as a distinct objective of the European Union the maintenance and development of the Union, such as: a space for liberty, security and

²⁹ For a more detailed study on the conclusion of international treaties and the effects produced, see Dragoș Chilea, *Drept Internațional Public*, ed. Hamangiu, 2007, București, pp. 18-33;

³⁰ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts*, Official Journal C 340, 10 November 1997;

³¹ *Protocol on the Schengen Acquis integrated into the framework of the European Union*, Official Journal of the European Union, C310/348, 16 December 2004;

justice; an area that permits within its limits; the freedom of movement in connection with appropriate measures for the control and protection of the exterior frontiers; the right to refuge; immigration; and also the prevention and fight against crime.

In the context in which the European Union undertook the objectives of the Schengen cooperation scheme, the procedures for accession to the cooperation scheme provided by article 140 of the before mentioned agreement were also incorporated.

The procedure for accession to the Schengen Area, which was included within the procedure for the accession to the European Union, was for the first time applied in 2004, when 10 new states joined the European Union.

As such, article 3 of the accession act of 2003 (signed by the Czech Republic, Hungary and 8 other states which joined the EU the following year) established that, from the time of accession, all of the provision granted by virtue of the Schengen Acquis are obligatory for the new signatory states, and in the same time, for this scope, two components of the before mentioned Acquis were considered and developed.

The first component, incorporate by means of an Annexe to the Accession Act of 2003, the entry into force of the Accession Act of 2003 was set to be the time of the accession of the ten states to the EU. For the second component, which refers in essence to the protection of personal data, sky frontiers, territorial frontiers, police cooperation, the Schengen information system, the maritime frontiers and visas, a set of conditions were envisaged for the signatory states in order to meet the standards required for integration in the Schengen Area. As such, the date of effective entry into the Schengen Area was convened to be established by the Council, by virtue of a Decision that would recognise the fulfilment of the necessary conditions.

The procedure used for the verification of the necessary conditions for the application of this second component of the Schengen Acquis was envisaged by the Decision of the Executive Committee from the 16th of September 1998 for the establishment of the permanent committee for the evaluation and implementation of the Schengen Accord (SCH/Com-es (98) 26 def.). Consequently, we can observe that this document was adopted before the integration of the Schengen Acquis in the European Union. Therefore, in order to understand the legal value of this instrument within the legal framework of the European Union, we must identify first the legal basis in connection with the Schengen Protocol. Considering the provisions of article 2, paragraph 1, of the Schengen Protocol and the provisions of the Decision 1999/435/CE of the Council from the 20th of May 1999 with regard to the definition of the Schengen Acquis for the establishment, in conformity with the relevant provisions of the Treaty for the Establishment of the European Community and the Treaty for the European Union, of the legal basis for every disposition and decision which represents and is contained in the Acquis, we can conclude that the legal basis for the adoption of the Decision of the Executive Committee from the 16th of September 1998 is provided by Title VI- Provisions regarding police and judiciary cooperation in criminal matters, from the Treaty of the EU.

By virtue of article 3 from the Accession Act of 2003, as a result of the assessment of the necessary conditions for the application of the two components of the Schengen Acquis in conformity with the procedures established by the Decision of the Executive Committee from the 16th of September 1998 and after the granting of the required approval from the European Parliament (which presented its position by means of Resolution 15.11.2007), the Council adopted Decision 2007/801/CE from the 6th of

December 2007 for the full application of the Schengen Acquis to the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia.

There is no reference in the before mentioned decision of the Council of any other aspect that was considered beside the ones that result from article 3, paragraph 2 of the Accession Act of 2003, more specifically, the “*verification, in accordance with the applicable Schengen assessment procedures, of the accomplishment by each new member state of the necessary conditions for the application of all parts of the Acquis.*”

The considerations presented this far, represent the first argument of the fact that the procedure established for the accession to the Schengen Area, integrated within the legal and institutional framework of the European Union, transforms the agreement to be bound of the states, from an unconditional act, as required and regulated by the rules of public international law, into an conditional act, regulated by the rules of the legal framework of the European Union, more specifically, the rules related to the strengthened cooperation scheme.

The applicable procedure in the case of Romania and Bulgaria is regulated by a similar regime to the one described so far. As such, the conclusion related to the actions taken by the Member States of the EU in the context of the Schengen Area and the rules of the strengthened cooperation scheme, together with the imposed conditional regime, are also applicable in the case of Romania’s and Bulgaria’s accession process to the Schengen Area.

The standings taken by officials of different Member States in relation to various aspects and topics, which at a first glance would not have any impact or connection with the procedure of the Schengen assessment, such as the MCV, may acquire a legal importance in the case of the accession process of Romania and Bulgaria to the Schengen Area in at least two aspects:

a) One aspect of importance is generated by virtue of a natural link between elements of the MCV, such as the measures taken for the prevention and fight against corruption, and elements of the Schengen Area assessment scheme, such as the control of the interior frontiers and the granting of visas. It is possible, that this confusion between the two distinct mechanisms might have altered the understanding of the framework of procedures specific to the decisional process of the Council in regard to the fulfilment of the conditions of entry into the Schengen Area. By invoking the natural link between the before mentioned elements, some states may hold that in spite of the conclusions reached by virtue of the assessment visits, some crucial elements for the application of the Schengen Acquis are not met. Even though, as we have already shown, the consent to be bound of the Member States in the process of the accession to the Schengen Area has become a conditional one, we cannot hold and consider that the decisional process within the Council is a formal one, and that, in reality, the evaluation committees are the ones that establish whether or not the conditions for the complete application of the Schengen Acquis have been fulfilled. We must recall that this competence falls in the exclusive attributions of the Council, in accordance to art. 4, paragraph 2 of the Accession Act of 2005, and that its performance must be an effective one even in the case of Romania’s and Bulgaria’s accession to the Schengen Area, as it was the case of the other states in 2009.

b) The second form by which these statements of the officials can affect the accession of Romania and Bulgaria to the Schengen Area is by creating a legal rule, compulsory to the other states that take part in these procedures, by virtue of an

instrument provided by public international law, namely custom. We consider appropriate to mention at this point, that any further commentary on this topic has an exclusively theoretical purpose, void of any practical legal substance, as the elements that point to the development of such a process are only at a nascent state. We only point out that, at this moment in time, it would be sufficient for Romania (and maybe in cooperation with Bulgaria and other EU Member States that encourage our countries' initiative) to state in a constant and firm manner the opposition to any supplementary conditions for the accession to the Schengen Area, conditions that are not included in the EU treaties and the additional acts adopted for the execution of the former.

Considering the fact that the votes casted by the Member States of the EU should be made in a manner appropriate and within the terms set by the treaties to which the states are parties, as we have already shown, any overstep or departure from these limits can be interpreted as a material breach. The origin of the breach in this case, rests in the departure of the EU Member States from the framework established by the European Union Treaty, the Treaty for the Functioning of the European Union and the Accession Act of 2005.

Consequently, given that the legal and institutional framework of the European Union has incorporated even from the entry into force of the Rome Treaty of 1958, concrete and efficient remedies for the control of the way by which Member States respect and obey the obligations assumed by virtue of the treaties that constitute the primary rules of the European Union, redress mechanisms were established for states that have suffered an unlawful injury. The rules of the European Union establish the competences of its institutions, and we refer especially at this point to the European Commission and the European Court of Justice, in order to solve any dispute that arises under the law of the European Union.

Pointing out the link between the primary rules of the European Union and the rules of public international law, and referring especially to the rules regarding state responsibility for international wrongful acts in the case of a breach of an international treaty, article 259 of the Treaty for the Functioning of the European Union, compensates the control and influence that the European Commission has by granting the possibility to Member States to access the European Court of Justice in order to seek redress, in case of an injury suffered by the actions of another Member State or in the case it fails to carry out the obligations undertaken under the EU treaties.

3. CONCLUSION

In light of the briefly explained background information, one question emerges in the case of Romania and Bulgaria and their process of accession to the Schengen Area: what rules prevail, public international law or European Law rules? The answer to this question is of utmost importance in the following context. If we would consider the principle of EU law supremacy, accept it as an overarching principle in all aspects of the European Union's affairs, and accept the establishment of a new customary local norm in relation to the mechanism of accession to the Schengen Area, given the practice of the states that accessed in 2007, we would depart from the regime established by the Schengen Protocol and the Implementation agreement. This is because, in accordance to these conventional norms, the votes casted by the Member States of the EU should be made in a manner appropriate to the terms set by the treaties to which the states are parties, as we have

already shown. Any overstep or departure from these limits can be interpreted as a form of material breach of the treaties. As a result, according to classic principles of international responsibility for international wrongful acts, such an action from a Member State would trigger the right for a claim of reparation of the damages incurred.

The legal consequences produced by the issue of the supremacy of European law originate from the legal framework of the European Union, public international law and in the general principles of law. The manifested intention of the European Court of Justice is to protect and progressively develop this concept. However, these legal issues must be strongly enrooted in the will of the contracting states and their desire to enforce this principle in their legal order. In this context, a case such as the Schengen issue, resolved by the States contrary to the obligations assumed by means of conventional law may produce unfortunate results. Such is the case of Romania's accession to the European Union and its pursue of entering the Schengen Area. An overview of Romania's situation would reflect a profound lack of solidarity generated. This lack of solidarity and uniformity in state practice is also affecting the legal workings of the European Union, including the effectiveness of the Supremacy principle, regardless of the CEJ efforts of protecting and developing the principle.

We conclude the present article by quoting the authors of an extensive work on the preliminary ruling procedure before the European Court of Justice, with the scope of widening the meaning of their resolution, that the ECJ has a novel position, being both the shadow of justice which the national judge must fill and the light that generates the shadow. Can ECJ also be the shadow of solidarity and good-faith in the interpretation of the conduct of parties to an international treaty between Member States?³²

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³² Mihai Sandru, Mihai Banu and Dragos Calin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene si experienta ale sistemului roman de drept*, ed.C. H. Beck, Bucuresti, 2013, p.XLIX

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